In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5498

NATIONAL SURETY COMPANY, a Corporation,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, JUDGE

Brief of Appellee

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STATEMENT OF THE CASE

The statement of the case as set forth in appellant's brief is substantially correct. Eugene Rogers was charged in the United States District Court for the Western District of Washington, Northern Division, with violation of the National Prohibition Act, and

upon his failure to appear for trial, his bail bond was forfeited. The National Surety Company was surety on said bail bond. Judgment *nisi* was entered. This matter came before the trial Court for trial after the issues were joined on the writ of *scire facias* and the answer in this case. The trial Judge granted judgment for the plaintiff. (Tr. 13.)

ARGUMENT

I.

Appellant's citations stating in substance that *scire facias* on a bail bond is the commencement of a new or original civil suit or action are correct. Appellant is also correct in stating that the pleadings are governed by the state procedure. On page 15 of the brief appellant begins his argument in main by stating that there was a variance between the writ and the bond. The writ was amended during the trial in the lower Court to conform with the bond. (Tr. 21.) This was over the objection of appellant. After the amendment the variance was cured inasmuch as said amendment was allowed. It is the position of the Government in this case that the variance is not cured by amendment was immaterial and of no consequence and therefore, not fatal.

See 6 C. J. (p. 1070), wherein it is stated that a variance that could not have surprised or prejudiced the adverse party will not be regarded as material. In note 13 on said page the following examples are given as being cases within the general principle stated in the text where variance has not been held not to be fatal:

(1) As to the offense charged. (*Whitfield vs. State,* 4 Ark. 171, and cases cited.)

(2) As to appearance. (*Sheets vs. People*, 63 Ill. 78.)

(3) As to the Court. (*State vs. Edminister*, 75 Atlantic 57.)

(4) As to the date of recognizance. (*Camp vs. State*, 45 S. W. 491.)

However, it is not necessary to go into the question of whether or not the variance was fatal any further, on account of the fact that it was within the discretion of the trial Court to allow a trial amendment of the writ in this case. (6 C. J. p. 1066.)

In the case of *Marks vs. Smith* (60 S. E. 1016) it was held that an amendment of a rule *nisi* issued on forfeiture of a bond in a criminal case changing the recital of the date of the execution of the bond so as to make

such recital of the date correspond to the true date of the bond does not add a new cause of action and is properly allowed. To the same effect are *McCrary vs. Willis* (35 Wash. 676); *Standard Furniture Company vs. Anderson* (38 Wash. 582) and *Land Company of*

II.

Florida vs. Fetty (15 Fed. (2nd) 942).

On page 17 of appellant's brief, he contends that the bond proved is conditioned different than the bond alleged. It is the Government's contention in answer to this statement that the words "term to term" which appellant contends were added and forged to the bond in the case at bar are surplusage and are absolutely immaterial and irrelevant, and unnecessary so far as the Government's right to have the bond forfeited in this case.

In *U. S. vs. Duke,* 5 Fed. (2nd) 825, it is held that a surety on a bond conditioned that defendant appear at a term of Court to be begun and held on the 1st day of February, 1924, was liable on defendant's failure to appear at the May term although there was no term in February, in view of Remington's Comp. Stat. of the State of Washington (Sec. 1957), which became a part

of the bond and required that defendant appear to answer the charges against him at all times until discharged according to law. The Duke case is a case decided by Judge Neterer, sitting as District Judge in the Western District of Washington, Northern Division. The Court stated that a Washington statute which required defendant to appear whenever the case was prosecuted and to be ever present until discharged became a part of the bond.

Therefore, even if the words "term to term" were left out of the bond in the case at bar it would appear that the validity of the bond in this case would not be altered. Section 1957, Remington's Comp. Stat. of Washington, which statute is mentioned in the *Duke* case, read as follows:

> "The recognizance shall be conditioned in effect that the defendant will appear to answer said charge whenever the same shall be prosecuted, and at all times until discharged according to law, render himself amenable to the orders and process of the Superior Court, and if convicted, render himself in execution of the judgment."

A bond is not invalid on account of additions to the same which are surplusage. (6 C. J. 995).

III.

On page 18 of appellant's brief, it is contended that the defendant was not duly proven to have been called and defaulted. In the *Rundlett* case, cited on page 19 of appellant's brief, it is stated that only the principal, need necessarily be called and that only the principal's default be necessarily entered of record. This statement is brought to the Court's attention on account of the fact that later on in appellant's brief it will be found that it is contended by appellant that it is necessary to prove the calling and default of the surety as well as the principal. This is not the law.

In the case at bar the judgment nisi was properly proven. The following was read into the record at the instance of the Government: Line 1—September 30, 1926, Filed information. Line 2—January 3, 1927, Entered order forfeiting bail and for bench warrant. Certainly it cannot reasonably be contended that after an order forfeiting defendant's bail and directing the issuance of a bench warrant is proven that the defendant cannot be said to have defaulted. In *Commonwealth vs. Fogel* (3 Penn. Super. 566), it was held that the calling of the accused will be presumed from a record entry of forfeiture. The record of a forfeiture

of a recognizance is conclusive evidence of the breach and cannot be impeached by extrinsic evidence. (6 C. J. 1071).

The entry of the forfeiture stands for proof of all the steps necessary to complete the forfeiture including the fact that the bail and defendant were duly called and did not appear and answer. (*Fox vs. Com.* 81 Pa. 511.) It has also been held that an entry "recognizance forfeited" is conclusive that defendant and the bail were called and did not appear." See *Com. vs. Basendorf* (25 A. 779).

The above cited cases bear out the Government's contention in this case that no error was committed by the trial Court even though the record does not show the defendant was called prior to the forfeiture on account of the fact that the judgment nisi was properly proved and the proper taking of all antecedent steps will after the judgment nisi, has been proven, be presumed.

In *Burrall vs. People*, (103 Illinois App. 81) it was held that the recognizance of record and the judgment of forfeiture are *competent* and *sufficient* evidence, under appropriate averments in scire facias to authorize judgment of execution according to the form, force and effect of the recognizance.

It is desired at this time to call to the Court's attention two statutes of the State of Washingon dealing with the forfeiture of bail. The statutes are set forth herein as follows: Remington's Compiled Statutes of Washington, 1915, Section 777—

> "Bonds are not to Fail for Want of Form—No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond."

This statute in substance provides that minor defects shall not invalidate bail bonds. Section 2235 Remington's 1915 Compiled Statutes of the State of Washington is as follows:

> "Action on Recognizance not to be Barred, etc. —No action brought on any recognizance given in any criminal proceeding whatever shall be barred or defeated, nor shall judgment be arrested thereon, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, or by

> reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court or before what justice the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance; and a recognizance may be recorded after execution awarded."

It will be seen that the above statute states in substance that no forfeiture or action on a recognizance shall be barred by reason of any neglect to note default of the principal. It is believed that these statutes are controlling in this case, and that the mere failure to note default by defendant in a bond forfeiture case in the Federal Court will not bar recovery by the United States, and also that minor defects in bonds must be disregarded in bond forfeiture proceedings in the Federal Courts located within the State of Washington.

IV.

On page 21 of appellant's brief it is contended that there was no proof whatsoever of judgment nisi. Tr. page 22, the following will be found—"January 3, 1927,—Entered order forfeiting bail and for bench warrant," which shows that judgment nisi was properly proven. It is contended, however, by appellant

that judgment nisi is not sufficiently pleaded with sufficient particularity as is required by law. It is contended that it is insufficient as it neither states the person, amount of bond or condition. In *Southern Surety Company vs. United States,* 23 Fed. (2nd) 55, the Court stated:

> "The eighth objection is that 'the Court erred in holding that the suit could be maintained, though the only forfeiture ever ordered was not against this defendant, but against Salinger.' This objection rests upon the overruling of a demurrer to the complaint (1) because it was nowhere alleged there that the bond declared therein had ever been forfeited as against the defendant, nor that any proceedings had ever been had or taken declaring the bond or bonds forfeited as against the surety company, or any proceeding declaring such forfeiture had ever been had; and (2) because the same point was raised in the motion for a new trial. But the denial of a motion for a new trial, or of any motion or claim made therein to sustain the motion for a new trial, is not reviewable in a federal appellate court, and in our opinion the averments in the complaint stated a clear and good cause of action against the surety in this case, without the allegations of whose absence counsel here complain."

From the above it may well be inferred that it is not

necessary to plead or prove any forfeiture as to defendant, who is a surety on the bond.

In *People vs. Tidmarsh* (113 Ill. App. 153), an order as follows:

> " * * * and now it is by the Court ordered that recognizance herein be and is now forfeited."

was held a sufficient formal declaration of a forfeiture.

To the same effect is the case of *Banta vs. People* (53 Ill. 434). In *State vs. Eyerman* (72 S. W. 539) it was held that it was not necessary that an order declaring a forfeiture of a recognizance state the amount of the forfeiture, especially in view of an Illinois statute which provided that a proceeding on a recognizance shall not be defeated on account of any defect of form or other irregularity. The Illinois statute mentioned herein, it will be seen, is very similar to Remington's Comp. Stat. 1915, Section 777, already mentioned herein. In the case of *Banta vs. People, Supra*, the following order of forfeiture was held sufficient and proper:

> "It is therefore, considered by the Court that the recognizance of the said defendant be and is hereby declared to be forfeited, and that default of said defendant and of his securities be entered of

record and that scire facias issue herein against the said Jonathan Way and Jordan Banta and Tillman Lane returnable to the next term of this Court, requiring the said defendant and his securities then and there to appear and show cause why the people should not have judgment and execution upon their said recognizance according to the form, force and effect thereof."

V.

It is contended on page 21 of appellant's brief that no proof was introduced that the surety was called to produce the defendant. The Government contends that no such proof was necessary. The *Rundlett* case, cited on page 19 of appellant's brief, so states by inference. To support his contention that the surety should be called to produce the defendant, appellant cites a portion of 3 Ruling Case Law at page 62. This citation, however, it will be noted deals with obligations which are in form and substance several only. It will be seen, however, by reference to the bond in the case at bar (Tr. 26) that the obligation or bail bond in this case was a joint and several obligation, and not a several obligation only. Therefore, appellant's quotation from 3 R. C. L., page 62, which quotation is on page 21 of appellant's brief, is not in point.

In *Southern Surety Company vs. United States, Supra,* it was held—it is unnecessary even to allege that the bond had been forfeited as against the defendant's surety. With reference to this point, we find the following pertinent statement in 6 C. J., 1046, which we deem to be the law—

> "It has been held that if there has been default on the part of the principal he is the only one to be called or notified and that a forfeiture of the recognizance may be declared or entered without calling the sureties and without previous notice to them unless such notice is required by statute. It has also been held that no notice need be given the surety to produce the principal on the day the bail is forfeited."

VI.

On page 24 of appellant's brief, he begins arguing on the point that there was a material, unauthorized alteration on the bond after its execution, which rendered it void. In answer to this the Government calls the Court's attention to the case of *U. S. vs. Duke, Supra,* which holds the words from "term to term" are unnecessary in cases in which the facts are similar to the case at bar. In the *Duke* case the Court points out that the Washington statute requires the defendant to appear at all times, not only during the term, but at all times dur-

ing subsequent terms. In the case of *U. S. vs. Fletcher*, 279 U. S. 163, it was held that a bail bond which required the defendant to appear from time to time means just the same as if the term to term was specified. In the *Fletcher* case the bond was conditioned that the defendant appear instanter and from time to time thereafter to which the case might be continued, and it was held said bond required defendant's appearance from day to day and from term to term until his case was disposed of whether or not there was a formal continuance; and to authorize the forfeiture of the bond at any time for the non-appearance of the main defendant. In view of the *Duke* case and the *Fletcher* case, it would seem that an addition to the bond in the case at bar of the words "from term to term" was an immaterial alteration—. An immaterial alteration does not in any way vary or change the legal effect of the instrument and does not render it invalid. 6 C. J. 1026.

VII

On page 27 of appellant's brief it is stated that the bond is void because no time is stated for appearance. In *U. S. vs. Duke, Supra*, no definite time or date was stated for the appearance of the defendant but the Court held that the Washington statute which provided

the defendant should appear at all times until discharged, governed, and automatically became a portion of the bail bond. In the *Duke* case the bond was conditioned "to appear during the first day of the term." In the present case the bond is conditioned for the appearance of the defendant during the 1925 term. The Washington statute automatically becomes a portion of the bond and requires defendant's appearance at all times.

In the case of *Whittaker v. U. S. F. & G. Co.*, see 300 Fed. 130, it was held that an indemnified surety on a stay bond on affirmative of judgment was liable for the amount of the judgment though the bond because of mistake or fraud on the part of the principal did not so provide, since such surety had constructive if not actual knowledge of the conditions intended by the Court and parties, and such condition was implied.

In the case of *People vs. Richardson*, 187 Ill. App. 634, it was held that where a bail bond was given on October 15, 1912, requiring the appearance of the accused at the next term of Court to be held on June 6, 1912, instead of 1913, the mistake did not render the bond a nullity; and it was held also that the parties were bound to know at their peril what was the first day

of the next term of Court. In view of the above cases, the Government's contention that the sureties were bound to know on what day they were bound to appear and that they were held at all times to appear, and that any mistake in the bond such as the one claimed was immaterial; seems correct. It must also be borne in mind that Remington's Compiled Statutes, Section 777, provides that bonds are not too fail for want of form.

The case of *Joelson vs. U. S.*, 28 Fed. 106, is cited by appellant in substantiation of his contention with reference to this point. The Joelson case is analyzed and distinguished in the Court's opinion in the case of *U. S. vs. Duke, Supra*, in which the Court said that the *Joelson* case is not parallel on account of the fact that a different state statute governed in the *Joelson* case on account of the bond being executed in another state.

VIII

On page 29 of appellant's brief he states that the defendant was not called at any time covered by the bond. This contention is answered by our citations with reference to the last point raised by appellant and considered in his brief. Obviously under the Washington statute the defendant was bound to appear at all times until discharged.

The case of *U. S. vs. Mace*, 281 Fed. 635, as pointed out in the case of *Duke vs. United States*, *Supra*, is not in point on account of the fact the bond in the Mace case was executed in another state. The Washington statute could not possibly be held to be controlling there. So with the case of *U. S. vs. Keiver*, 56 Fed. 422, in which case the bond was executed and filed in Federal Court in the state of Wisconsin, and the Wisconsin statute must be held to be controlling in that instance with reference to the interpretations of the conditions and the obligation of the bond.

In the case of *U. S. vs. Davenport*, 266 Fed. 425, the Court stated:

> "There seems no reason for a strict or highly technical construction of law in favor of defendants. This action does not involve the guilt or innocence, conviction or acquittal of any-one. It is not a criminal case. Upon the failure of the principal to appear the sureties became debtors."

U. S. vs. Sanges, 144 U. S. 310, 36 L. Ed. 445;

U. S. vs. Zarafonitis, 150 Fed. 97, 80 C. C. A. 51.

In *United States vs. Fletcher*, *Supra*, it was held that a bail bond was valid and required the defendant to appear at all times until discharged even though it was

not conditioned for the appearance of the defendant from term to term, but was merely conditioned for his appearance from time to time. In view of the above decisions it is claimed on behalf of the Government that there is no merit in the contention that the defendant was not called at any time covered by the bond.

IX.

On page 34 of appellant's brief it is contended that the bail is discharged under the law and under the Washington statutes. Remington's Compiled Statutes, Wash. 1922, section 2311, reads as follows:

> "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown."

Also section 2312:

> "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

Appellant contends that inasmuch as the charge against defendant in the case at bar was not filed within thirty days after his arrest that the bail is automatically discharged. According to section 2311 of Remington's Comp. Stat. this would be true if the principal in a criminal case was dismissed.

Appellant also relies upon Remington's Comp. Stat. 1922, section 2312, which provides that if defendant be not brought to trial within sixty days after the charge is filed against him the Court shall order it to be dismissed. Appellant contends that section 2312 inures to the benefit of the surety in the case at bar inasmuch as defendant in the case at bar was not tried within sixty days after the information was filed against him.

Assuming for the purpose of argument, but not conceding that these statutes inure to the benefit of the surety they are not applicable in the case at bar. In the case at bar the Court did not at any time dismiss the information for want of prosecution.

In the cases of *State vs. Lewis*, 35 Wash. 261, and *State vs. Caruso*, 137 Wash. 519, cited by counsel for appellant on page 35 of his brief, the informations or charges filed against defendant were dismissed by the Court. It is the Government's contention, however,

that the surety cannot possibly be discharged from his obligation upon the bond until the principal is dismissed from the information or indictment in the case.

Section 2313 Remington's Comp. Stat. of the state of Washington, 1922, provides as follows:

> "Whenever the Court shall direct any criminal prosecution to be dismissed the defendant shall if in custody be discharged therefrom or if admitted to bail his bail shall be exonerated, and if money has been deposited instead of bail it shall be refunded to the person depositing same."

In view of the foregoing statute it would seem the bail cannot be exonerated without the dismissal of the charge against the defendant. Section 1957 Remington's Comp. Stat. of the state of Washington, 1922, states in substance that the recognizance shall be in effect at all times until the discharge of the defendant according to law. It is a general rule of laws announced by the decisions of Federal Courts that a forfeiture of a bail bond in a criminal action is not barred on account of the fact that prosecution of the criminal action is barred by the Statute of Limitations. *U. S. vs. Davenport*, 266 Fed. 427. *U. S. vs. Dunbar*, 83 Fed. 151. On page 154 of the *Dunbar* case, the Court said—"whether the offenses with which William Dunbar was

charged were barred by lack of time could only be determined in the prosecutions against him. The undertaking of the sureties was to answer for his appearance. That obligation did not at all depend upon or involve the question whether the prosecution of the respective offenses was barred by lapse of time."

X.

On page 38 of appellant's brief it is contended the forfeiture was premature in that the action was set for trial after the date of the forfeiture of the bail bond. There is no merit whatsoever in this contention. See *Southern Surety Co. vs. United States*, 23 Fed. (2nd) 55, which holds that it is no defense for the surety that a trial date was set after the forfeiture of the bond. To the same effect is *Kirk vs. U. S.*, 131 Fed. 338, which was affirmed in the United States Supreme Court in 51 L. Ed. 671.

XI.

On page 39 of appellant's brief, it is contended that the bond was void for failure to designate any crime. It appears that there is also no merit in this contention. It will be seen that the bond in question is conditioned for the defendant to answer the charge of violation of

the National Prohibition Act. In *Moran vs. U. S.*, 10 Fed. (2nd) 455, it was held that a bail bond reciting a violation of a Federal statute is sufficiently definite with reference to the description of the offense to bind the sureties.

In the case of *State vs. Reames*, 66 Southern 393, it was held an incorrect or insufficient description of the offense in an appearance bond does not relieve the sureties as they are held to know that they are putting up bond for the appearance of the defendant for trial for an offense at the next term of Court. In *Territory vs. Conner*, 87 Pacific 591, it was held that in a bail bond it is not required that all the facts necessary to be stated in the indictment should be set forth with legal accuracy or in the terms of the statute, but it is sufficient if it shows that the defendant was charged with the commission of a public offense.

With reference to the contention of appellant that the bail bond is void for insufficient description of the offense, Section 777 of Remington's Comp. Stat., Wash. 1922, should also be borne in mind by the Court. This section as heretofore pointed out herein, prescribes that no bond shall fail for want of form.

XII.

On page 40 of appellant's brief, he contends that the

sureties were relieved because the information charges a different crime than that set forth in the bond. Bail bonds are often given before the indictment or information is filed and therefore, it is not necessary to have the information or indictment conform in every detail as to the description of the offense in the bond. *Wells vs. Terrell,* (Go.) 49 S. E. 319. The fact that the description of the offense in the bail bond or recognizance varies from that set forth in the information or indictment will not avoid the undertaking if it in substance discloses the offense charged.

At 6 C. J. 1002, it is stated—

> "Where the offenses are different degrees of the same class as where the indictment is for an offense of a higher grade than that described in the undertaking and includes the latter offense or arose out of the same act or transaction the bail are not released."

In the case at bar, it will be seen that the offense charged in the information and the offense set forth in the bond are violations of the same statute and arise out of the same transaction.

It is contended by the Government, however, that appellant cannot now question in the appellate Court insufficiency of the evidence in the trial Court to sustain

a judgment for the plaintiff on account of the fact that after appellant moved for a non-suit and excepted to the Court's denial of the same, appellant's counsel introduced defense testimony and failed to renew its motion for dismissal at the end of the entire case. Under the decisions as announced by the Federal Courts in all the Circuits, appellant has by his failure to renew his motion at the end of the case waived his right to have the upper Court consider the insufficiency of the evidence to sustain the judgment below.

American R. R. Co. of Porto Rico vs. Santiago et al, 9 Fed. (2nd) 753;

Bunker Hill & Sullivan Mining and Concentrating Co. vs. Polak, 7 Fed. (2nd) 583;

Columbia & Puget Sound R. R. Co. vs. Hawthorne, 144 U. S. 202, 36 L. E. D. 405;

Gilson vs. F. S. Royster Guano Co., 1 Fed. (2nd) 82.

It is also contended that appellant did not properly except to the judgment in this case, which judgment had included in it various findings made by the Court.

It will be remembered that this was a non-jury trial, and it is contended by the Government that the findings

in the judgment should have been separately excepted to by the appellant in order to properly preserve his record on appeal.

In view of all the foregoing, it is respectfully submitted that the judgment of the lower Court should be affirmed.

Respectfully submitted,

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